Supreme Court, U.S.
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No. ____

In The

# Supreme Court of the United States

October Term, 1996

J. ALAN JENSEN, Ph.D.,

*Petitioner,*

v.

BOARD OF PSYCHOLOGY OF THE STATE OF CALIFORNIA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California Second Appellate District, Division Five**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Did petitioner Jensen receive notice of an administrative accusation seeking to revoke his license to practice psychology, sufficient to satisfy the federal due process criteria established by this Court in *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314, 94 L.Ed. 865, 873, 70 S.Ct. 652 (1950), when the accusation constituting the notice of charges against Jensen was sent by certified mail to his address of record on file with the Board of Psychology but was returned by the U.S. Postal Service as "unclaimed" and without a signed certified mail return receipt?

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## PETITION FOR WRIT OF CERTIORARI

Petitioner J. Alan Jensen, Ph.D., prays that a writ of certiorari be issued to review a final judgment of the Court of Appeal of the State of California, Second Appellate District, Division Five, filed May 14, 1996, as to which the California Supreme Court denied a petition for review on August 14, 1996. The final judgment of the California Court of Appeal affirmed a judgment of the Los Angeles County Superior Court denying a petition for a writ of administrative mandamus filed by petitioner Jensen which sought to set aside a default decision of respondent Board of Psychology of the State of California on the ground, *inter alia*, that he was not given notice of the administrative charges against him sufficient to satisfy the requirements of *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314, 94 L.Ed. 865, 873, 70 S.Ct. 652 (1950).

## OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Five, filed May 14, 1996, is unpublished and not reported.[1] It is reproduced in Appendix A to this petition. The August 14, 1996 order of the California Supreme Court denying review of the judgment of the California Court of Appeal is reproduced as Appendix B to this petition.

[1] Although this opinion is not reported, another California court of appeal has reached the same due process decision. *Baughman v. Medical Board*, 40 Cal.App.4th 398, 402, 46 Cal.Rptr.2d 498 (1995).

## JURISDICTION

The date of the California Supreme Court's order denying review of the California Court of Appeal decision was August 14, 1996. This petition for a writ of certiorari is being filed within 90 days of that date. The California Supreme Court is the court of last resort in the state of California and its denial of review of the Court of Appeal decision filed May 14, 1996, was a decision of the highest court of the state of California.

Petitioner Jensen invokes the jurisdiction of this Court under 28 U.S.C. § 1257, subdivision (3) in that the question presented in this case involves a right claimed under the Constitution of the United States.

## CONSTITUTIONAL PROVISIONS INVOLVED

**Fourteenth Amendment, § 1, to the United States Constitution:**

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

## STATUTES INVOLVED

**California Government Code section 11505 provides in relevant part:**

"(a) Upon the filing of the accusation the agency shall serve a copy thereof on the respondent as provided in subdivision (c). The agency may include with the accusation any information which it deems appropriate, but it

shall include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506. The copy of the accusation shall include or be accompanied by (1) a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon him of the accusation, and that failure to do so will constitute a waiver of his right to a hearing, and (2) copies of Sections 11507.5, 11507.6, and 11507.7.

"(b) The statement to respondent shall be substantially in the following form:

"Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the agency within 15 days after the accusation was personally served on you or mailed to you, (here insert name of agency) may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Defense, or by delivering or mailing a notice of defense as provided by Section 11506 of the Government Code to: (here insert name and address of agency). You may, but need not, be represented by counsel at any or all stages of these proceedings.

". . . . "

**California Government Code section 11506 provides:**

"(a) Within 15 days after service upon him of the accusation the respondent may file with the agency a notice of defense in which he may:

"(1) Request a hearing.

"(2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed.

"(3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that he cannot identify the transaction or prepare his defense.

"(4) Admit the accusation in whole or in part.

"(5) Present new matter by way of defense.

"(6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantive rights.

"Within the time specified respondent may file one or more notices of defense upon any or all of these grounds but all such notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.

"(b) The respondent shall be entitled to a hearing on the merits if he files a notice of defense, and any such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such

notice shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in paragraph (3) of subdivision (a), all objections to the form of the accusation shall be deemed waived.

"(c) The notice of defense shall be in writing signed by or on behalf of the respondent and shall state his mailing address. It need not be verified or follow any particular form.

"(d) Respondent may file a statement by way of mitigation even if he does not file a notice of defense.

"(e) As used in this section, "file," "files," "filed," or "filing" means "delivered or mailed" to the agency as provided in Section 11505."

**California Government Code section 11520 provides:**

"11520. (a) If the respondent fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on respondent to establish that he is entitled to the agency action sought, the agency may act without taking evidence.

"(b) Nothing herein shall be construed to deprive the respondent of the right to make any showing by way of mitigation."

## HOW THE FEDERAL QUESTION WAS RAISED

The federal constitutional question presented here was first raised by petitioner Jensen in his petition for administrative mandamus in the Los Angeles County Superior Court. Petitioner Jensen did not have an opportunity to raise this question in the California administrative proceeding before respondent Board had lost jurisdiction to reconsider its default decision revoking his license.

When petitioner Jensen presented the federal question to the California Court of Appeal, that court decided this constitutional issue against him. (App. 22-26.)

The California Supreme Court denied Dr. Jensen's petition for review which raised the same issue of federal due process. (App. 30.) Where the highest state court holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, it is well settled by decisions of this Court that the federal questions have been properly raised in the state courts. *Orr v. Orr*, 440 U.S. 268, 274-75, 59 L.Ed.2d 306, 99 S.Ct. 1102 (1979); *Whitney v. California*, 274 U.S. 357, 360-61, 71 L.Ed.2d 1095, 47 S.Ct. 641 (1927).

## STATEMENT OF THE CASE

### A. Petitioner and His Psychology License

On October 26, 1988, petitioner Jensen was issued a license to practice psychology in the State of California.

(5.1 App.[2] 2, ¶ 2, lines 11-12; admitted in answer, 5.1 App. 39, ¶ 1, lines 2-3.) During the five-year period between licensure and the Default Decision by respondent Board dated November 22, 1993, petitioner Jensen's psychology license had not been subject to discipline or adverse action by respondent Board. (5.1 App. 2, ¶ 3, lines 13-15; admitted in answer, 5.1 App. 39, ¶ 1, lines 2-3.)

In the fourth paragraph of his petition, petitioner Jensen alleged that he had a vested property right in his license to practice psychology in the State of California. (5.1 App. 2, ¶ 4, lines 16-17.) *See Hewitt v. Board of Medical Examiners*, 148 Cal. 590, 592, 88 P. 39 (1906); *Smith v. Board of Medical Quality Assurance*, 202 Cal.App.3d 316, 326, 248 Cal.Rptr. 704 (1988). The California Supreme Court has held that such a right is "too important to relegate it to exclusive administrative extinction." *Bixby v. Pierno*, 4 Cal.3d 130, 144, 93 Cal.Rptr. 234, 481 P. 2d 242 (1971). Even in the face of this settled precedent, the Board in its answer denied that petitioner Jensen had a property right, and alleged that it was nothing "but a privilege to practice a regulated profession, revocable under law for just cause." (5.1 App. 39, ¶ 2.)

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[2] The abbreviation "5.1 App." refers to the appendix in lieu of a clerk's transcript which was part of the record filed before the California Court of Appeal pursuant to Rule 5.1 of the California Rules of Court. Petitioner Jensen filed his California superior court petition *in propria persona*.

### B. The Accusation Against Petitioner's License

On or about July 15, 1993, respondent Board filed an accusation containing a prayer seeking to revoke or suspend petitioner Jensen's psychology license. (5.1 App. 2-3, ¶ 6; admitted in answer, 5.1 App. 39, ¶ 3.)

### C. Service and Lack of Actual Notice

The petition alleged and respondent's answer admitted that the Board's Default Decision stated:

> "2. On or about July 15, 1993, Hattie Lovato, an employee of the Department of Consumer Affairs, sent by certified mail a copy of Accusation No. D-5302, Statement to Respondent, Government Code section 11507.5, 11507.6 and 11507.7, Notice of Defense forms, and a Request for Discovery to respondent's address of record with the Board which was and is 3686 Sweetwater Canyon Drive, Malibu, California 90265. The above service was effective as a matter of law pursuant to the provisions of Government Code section 11505, subdivision (c)." (5.1 App. 3, ¶ 7, lines 2-11; admitted in answer, 5.1 App. 39, ¶ 3; also 5.1 App. 10.)

While the Board may have mailed the Accusation to petitioner Jensen, Jensen denied under oath in his superior court petition that he ever received it. (5.1 App. 3, ¶ 8, lines 12-13.) His petition also denied under oath that he ever had actual notice of the contents of the accusation or the other documents purportedly mailed to him. (5.1 App. 3, ¶ 8, lines 13-14.)

The administrative record[3] supplied by the Attorney General and filed with the California superior court corroborated petitioner Jensen's allegations that he never received the accusation and had no actual notice of the contents of accusation or other documents mailed to him by the Board of Psychology on or about July 15, 1993. The administrative record shows that the Accusation and related materials were sent to petitioner Jensen by certified mail, but the envelope containing the accusation and other materials was returned to the Board of Psychology as "Unclaimed," after two attempts at delivery. A copy of the front of the certified mail envelope was set forth on page 39 of the Administrative Record. The envelope bears a stamp, "Returned to sender, UNCLAIMED." The envelope also shows that apparently two attempts were made at delivery – a first notice on 7-17 and a second notice on 8-6. The envelope was returned on 8-16-93. (AR 39.) The contents of the envelope are pages 2-38 of the Administrative Record, as authenticated by the proof of service which appears on page 38. The certified mail "Domestic Return Receipt" was returned to respondent Board along with the returned package. The receipt is not signed by anyone. (AR 40.)

Since respondent Board's own evidence in the Administrative Record shows that the envelope containing the Accusation was never delivered to petitioner

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[3] The Administrative Record filed in superior court will be referred to by the abbreviation "AR." The California Board of Psychology did not have before it any of the documents contained in this administrative record when it made its Default Decision.

Jensen, it is clear that Jensen never received a copy of the accusation and the other documents mailed to him by certified mail on July 15, 1993. Consequently, petitioner Jensen did not have actual notice or any other type of notice which would reasonably have caused him to believe that an accusation had been filed against him and that he was required to file a Notice of Defense or Request for Hearing within fifteen (15) days of his receipt of the package that never was delivered. The U.S. Postal Service's notices of attempted delivery do not indicate the identity of the sender or the contents of the package.

**D. The Default Decision of Respondent Board**

On November 22, 1993, respondent Board issued its Default Decision revoking petitioner JENSEN's psychology license. (AR 42-45.) This decision was made effective December 22, 1993. (AR 45.) (5.1 App. 3, ¶ 13, lines 17-19; admitted in answer, 5.1 App. 41, line 12.)

The certified mail envelope and the certified mail "Domestic Return Receipt" for the Default Decision similarly show that the Default Decision was never delivered to petitioner Jensen at his address on file with the Board. (AR 71-73.)

The Default Decision recites that "based on the evidence before it, the Board finds that allegations, and each of them, contained in the Accusation No. D-5302 are true." (AR 44, ¶ 8.) Yet the declaration under penalty of perjury of Suzanne Taylor, Enforcement Coordinator of the Board of Psychology, shows this recital in the Default

Decision to be false. The Taylor declaration states in pertinent part:

> "6. After reconfirming his address, the staff requested the Attorney General's Office to prepare a default decision.
>
> "7. Acting in accordance with Government Code section 11526 and in keeping with our usual practice, the proposed decision was circulated to our board members for a mail vote. Members may elect to approve the decision, reject it or postpone action until the matter can be discussed at a future board meeting.
>
> "8. The board members returned ballots which were counted by the staff. The vote was to adopt the decision. Since none of the members placed a 'hold' on the decision, it was not set down for discussion at a board meeting. Accordingly, there are no minutes which document the adoption of the decision." (AR 96-97.)

The Taylor declaration made it crystal clear that the Board did not consider evidence presented at a default prove-up. It considered no evidence at all. The default decision was made solely on the basis of the draft default decision prepared by the Attorney General and circulated to the members of the board.

### E. The Superior Court Proceedings

Petitioner Jensen never had an opportunity for a hearing before the Board of Psychology seeking relief from default. After entering a default decision, the Board of Psychology has statutory jurisdiction only for 30 days to reconsider its default decision. As petitioner Jensen

alleged in his verified mandamus petition, he did not learn of the default decision revoking his license until after the 30-day reconsideration had expired.

On January 21, 1994, petitioner Jensen filed *in propria persona* his verified petition for a writ of administrative mandate and request for stay. (5.1 App. 1-37.) On March 10, 1994, respondent Board of Psychology filed its answer to the petition.[4] (5.1 App. 38-46, 170.) On April 1, 1994, present counsel substituted in place and in stead of petitioner Jensen representing himself. (5.1 App. 47-48.)

The California superior court never explicitly ruled upon petitioner Jensen's written objections to the content of the Administrative Record supplied by the Attorney General, despite written objections in the Notice of Filing and despite a renewed request for a ruling. The following colloquy took place at the hearing on June 14, 1994:

> "MR. IUNGERICH: . . .
>
> "First of all, we had some evidentiary objections as far as the Administrative Record that are before you. They're not ruled upon.
>
> "THE COURT: I will consider only admissible evidence.
>
> "MR. IUNGERICH: All right. Well, does that mean the information that was not before them and the latter half that my – my objection is granted?

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[4] It should be noted that this answer was apparently sent by first-class mail (rather than certified mail) and was received by petitioner Jensen.

"THE COURT: The – I will rule – the rule – I just ruled. Anything else?" (RT 3.)

Apparently, the objection was overruled because in the judgment, objected-to portions of the record are cited for findings made in that judgment. (5.1 App. 163, line 13.)

After a proposed judgment was submitted by respondent Board, petitioner Jensen submitted written objections to the proposed judgment and renewed his request for a statement of decision. (5.1 App. 155-160.) The trial court never ruled on these objections and never issued a statement of decision.

On August 23, 1994, Judge Wayne signed the proposed judgment submitted by the Attorney General on behalf of respondent Board of Psychology. (5.1 App. 161-166.) The parties, however, were never notified that Judge Wayne had signed the judgment or when. On February 3, 1995, petitioner Jensen filed his notice of appeal from the judgment denying his petition for a writ of administrative mandate. (5.1 App. 167.) The notice of appeal was timely filed pursuant to the provisions of Rule 2(a)(3) of the California Rules of Court with 180 days after entry of the judgment. No notice of entry of judgment was ever sent to undersigned counsel or petitioner Jensen under subsections (a)(1) or (a)(2) of Rule 2.

On May 14, 1996, the California Court of Appeal affirmed the superior court judgment and thereafter denied a timely petition for rehearing. (App. A.) On August 14, 1996, the California Supreme Court denied petitioner Jensen's timely petition for review filed in that court. (App. B.)

## REASONS FOR GRANTING THIS PETITION

### I

### THIS CASE PRESENTS AN IMPORTANT QUESTION OF THE NOTICE REQUIRED BY FEDERAL DUE PROCESS BEFORE A STATE AGENCY MAY TAKE A PROFESSIONAL LICENSE BY DEFAULT

In this case, the California Board of Psychology served petitioner Jensen with an administrative accusation seeking to revoke his license to practice psychology. The accusation was served by certified mail. The U.S. Postal Service returned the envelope containing the accusation as "Unclaimed" after at least two attempts at delivery. The envelope was properly addressed to petitioner Jensen's address of record with the Board of Psychology,[5] but no one at that address signed a certified mail return receipt.

California Government Code section 11505(c) provides:

> "The accusation and all accompanying information may be sent to respondent by any means selected by the agency. But no order adversely affecting the right of the respondent shall be made by the agency in any case unless

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[5] Even though the Postal Service's notice of attempted delivery contained no information whatsoever about the sender or the contents of the package, the California Court of Appeal presumes that since the package was sent to the address of record, Dr. Jensen evaded service because he was supposed to possess clairvoyance as to the contents of the package.

> the respondent shall have been served personally or by registered mail[6] as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. Service by registered mail shall be effective if a statute or agency rule[7] requires respondent to file his address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to respondent at the latest address on file with the agency." (Footnotes added.)

Referring to the foregoing language of section 11505(c), the California Court of Appeal stated in its opinion:

> " . . . Most importantly, the provision states that mailing the accusation to the address of record is sufficient. Unlike other statutes which allow service by mail, but require additional proof of service such as a return receipt signed by the accused party, section 11505, subsection (c) requires only that the Board mail the accusation and does not mention any other requirements to

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[6] California Government Code section 8311 provides that where the state, or any officer or agency of the state, is required by law to send a notice by registered mail, sending the notice by certified mail is considered sufficient compliance.

[7] Respondent Board of Psychology has adopted an administrative regulation requiring that "Each person holding a license as a psychologist shall file with the board his proper and current mailing address, and shall report to the board at its Sacramento office any and all changes of address, giving both his own and his new address." Cal. Code of Regulations, tit. 16, § 1380.5.

> complete service. (*Evans v. DMV* (1994) 21 Cal.App.4th 958, 970.)" (App. 21.)

Thus, according to the Court of Appeal decision, the clock started running for potential default on the date of mailing of the certified letter containing the accusation (and the notice requiring a Notice of Defense be filed within 15 days). California Government Code section 11506(a) provides that "Within 15 days of service upon him of the accusation the respondent may file with the agency a notice of defense . . . " in which he may request a hearing, make objections, present new matter by way of defense, etc. Under the reasoning of the Court of Appeal, a licensee may be defaulted if the 15-day period for filing a notice of defense runs before the licensee picks up his certified mail. California Government Code section 11520(a) provides that "If the respondent fails to file a notice of defense or to appear at the hearing, the agency may take action upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent. . . . "

Under the Court of Appeal's interpretation of the service and default statutes, petitioner Jensen submits that he has been denied due process of law under the Fourteenth Amendment to the United States Constitution because he was not afforded actual notice and an opportunity to be heard when respondent Board revoked his psychologist's license by its Default Decision. This Court has held that "Failure to give notice violates 'the most rudimentary demands of due process of law.' " *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84, 99 L.Ed.2d 75, 81, 108 S.Ct. 896 (1988) (citations omitted). In *Peralta*, despite a return showing "personal service," the defendant denied he had ever been

personally served. This Court held that the default judgment against him could not stand because "[A] judgment entered without notice or service is constitutionally infirm." *Id.*

In the instant case, the Board's own evidence in the administrative record demonstrates that the certified mail envelope containing the accusation and the notice that he had to file a Notice of Defense with fifteen (15) days **were never received by him (no signed return receipt) or delivered to the address on file with the Board.** When the Board staff circulated the Default Decision to the members for a mail vote, it knew that the envelope containing the accusation and the notice to file a notice of defense had never been delivered. It knew that because the entire package had been returned to it unclaimed. When the Default Decision was made, there was no proof of service by personal service or by registered or certified mail as required by law.

The chronology supplied by respondent Board in the administrative record admits that petitioner Jensen was never personally served, and neither Dr. Jensen nor any one else signed for a copy of the accusation. (AR 96-98.) Due process under the Fourteenth Amendment to the United States Constitution therefore required that the court below set aside the Default Decision of the Board of Psychology for failure to effect service upon petitioner Jensen which was reasonably calculated to apprise him of the proceedings at which his license might be revoked.

*Mullane v. Central Hanover Bank*, 339 U.S. 306, 314, 94 L.Ed. 865, 873, 70 S.Ct. 652 (1950), has long stood for the proposition that a person's property (here a psychology

license) may not be taken without due process and that a fundamental requisite of such process is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of proceedings which could result in a deprivation of property so as to afford them an opportunity to be heard. *Mullane* further held that "when notice is a person's due, process which is a mere gesture is not due process." 339 U.S. at 315, 94 L.Ed.2d at 874. In the instant case, respondent Board through its staff knew that the envelope giving notice was returned "Unclaimed" and that petitioner Jensen did not receive it. Hence the notice given in this case was such a "mere gesture."

In *Sinclair & Valentine Co. v. County of Los Angeles*, 201 Cal.App.3d 1021, 1027, 247 Cal.Rptr. 568 (1988), another California Court of Appeal found such a "mere gesture" under *Mullane* where the County of Los Angeles mailed a notice of sale at public auction " . . . with full knowledge that such notice would be undeliverable as addressed." In this case, when the envelope was returned "Unclaimed," respondent Board similarly had full knowledge that notice had never been given to Dr. Jensen. To sustain a default judgment revoking Dr. Jensen's license to practice his profession when the Board of Psychology *knew* that its notice of charges had never reached him is the paradigm violation of *Mullane* principles.

Under the Due Process Clause of the Fourteenth Amendment, notice means "actual notice," not notice mailed but undelivered. In *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 490, 99 L.Ed.2d 565, 108 S.Ct. 1340, 1348 (1988), this Court held that, even in complex probate matters, " . . . requirement of actual notice to

known or reasonably ascertainable creditors is not so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted."

Petitioner Jensen submits that respondent Board's entering a Default Decision violated due process when the Board acted on a certified mail receipt which conclusively demonstrated that Jensen did not receive the accusation and other materials which were returned "Unclaimed." The only case to deal directly with the precise issue presented in this case, *Wise v. Herzog*, 114 F.2d 486 (D.C. Cir. 1940), has held that due process is not satisfied, even though a statute and court rule permitted service by registered mail, when the receipts were returned "unclaimed" or "refused."

Courts of states other than California have also concluded that service by registered or certified mail requires actual delivery to the addressee or the addressee's agent, and have construed their service by mail statutes to require actual delivery, in order to avoid due process problems. *See Edwards v. Edwards*, 801 P.2d 782, 786 (Or. 1990) (service of summons by mail is not adequate "unless receipt is acknowledged by defendant"); *Cole v. First Nat. Bank of Fort Smith*, 800 S.W.2d 412, 414 (Ark. 1990) (return receipt signed by stepdaughter inadequate because she was not appointed as agent); *Green v. Yarbrough*, 771 S.W.2d 760, 761 (Ark. 1989) (return receipt signed by sister insufficient); *Hudson v. Musor*, 519 A.2d 319, 321 (N.H. 1986) (service improper when employee not authorized to act as agent signed return receipt); *Administrators of Tulane Educational Fund v. Ortego*, 475 So.2d 764 (La. 1985) (assistant librarian not designated to receive mail for law professor); *Boyles v. Boyles*, 302 S.E.2d

790, 796 (N.C. 1983) (mail notice effective only if "affected party received actual notice or there was affirmative evidence that he or she had refused the notice"); *Ex Parte Shuttleworth* (Ala. 1982) 410 So.2d 896, 898 and 900 (signature of party's father insufficient for effective certified mail service); *Rocky Mtn. Adjustment Co. v. Pease Bros.*, 604 P.2d 921, 923 (Utah 1979) (return receipt must be signed by addressee or addressee's agent); *Lydick v. Smith*, 266 N.W.2d 208, 211 (Neb. 1978) (service inadequate when registered receipt returned unsigned); *Oedekoven v. Oedekoven*, 475 P.2d 307, 308 (Wyo. 1970) (service defective when return receipt signed by person other than addressee); *Esterdahl v. Wilson*, 110 N.W.2d 241, 243-244 (Iowa 1961) (certified mail delivered to defendant's wife inadequate); *Masri v. Adamar of New Jersey, Inc.*, 595 A.2d 398, 399, 401-402 (D.C. App. 1991) (service defective because of return receipt, though signed in box marked "Signature-Addressee," not signed with appellant's name); *Larry M. Rosen & Associates, Inc. v. Hurwitz*, 465 A.2d 1114, 1115, 1117 (D.C. App. 1983) (return receipt signed by receptionist for defendant law firm with no showing that receptionist was agent for service of process held insufficient); *Oak Island Southwind Realty v. Pruitt*, 366 S.E.2d 489, 491-492 (N.C. App. 1988) (service improper when receipt not signed by defendant or someone shown to be her agent); *Ingrassia v. Ingrassia*, 509 N.E.2d 729, 742 (Ill. App. 1987) (service by certified mail not complete until party to whom it is addressed receives it); *Guen v. Guen*, 381 A.2d 721, 724-725 (Md. App. 1978) (service ineffective because signature on receipt was not that of person to be served); *Roberts v. Watson*, 359 N.E.2d at 619-620 (Ind. App. 1977) (service insufficient when

husband signed return receipt); *see also Bucholz v. Hutton*, 153 F.Supp. 62, 68 (D. Mont. 1957) (service insufficient when return receipt signed by person without authority).

*Mullane* is the cornerstone of due process in the United States. This Court should grant certiorari so that its important teachings are not watered down and diminished as the Court of Appeal and the superior court have done in this case. Furthermore, this Court does not appear to have addressed what *Mullane* requires in the context of administrative law where the rights of professionals, here a psychologist, to practice their learned professions and pursue their livelihoods are at a risk of forfeiture by the type of stealth default which was taken here.

## II

## THE ISSUE HERE MAY REQUIRE EXCEPTIONAL REVIEW OF FACTUAL ISSUES

Petitioner is aware that, as a general rule, this Court will not exert its jurisdiction merely to review a decision of a state court on a question of fact. In this case, however, it may be necessary for this Court to invoke the exceptions to this general rule. This Court has held that it will review a state court's findings "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske v. Kansas*, 274 U.S. 380, 385-86, 71 L.Ed. 1108, 47 S.Ct. 655 (1927).

The California Court of Appeal opinion states, without any evidentiary support, that "Substantial evidence exists to support the trial court's finding that the Board complied with the statutory requirements for serving Dr. Jensen *and Dr. Jensen intentionally avoided the Board's attempts at notice.*" (App. 22; emphasis added.) On the record that was before the Board of Psychology when it entered its Default Decision, all the Board knew was that it had sent out an accusation by certified mail and that it was returned "Unclaimed" and without a signed return receipt. One can hardly confer from those facts that Dr. Jensen "intentionally avoided the Board's attempts at notice." Recall that Dr. Jensen never had any hearing on a motion for relief from default because the Board of Psychology's statutory jurisdiction had expired before he learned of the default. Since there was no hearing at which evidence was ever taken in this case (the superior court administrative mandamus proceeding was judicial review of the Board of Psychology administrative record), there was never any hearing before a California administrative agency or a California court at which evidence was taken and witnesses were examined and cross-examined. Hence there is no proper evidentiary basis whatsoever for the Court of Appeal's finding that substantial evidence exists to support the trial court's finding that "Dr. Jensen intentionally avoided the Board's attempts at notice."

Petitioner Jensen made seasonable objections to consideration of the contents of the administrative record that had not been considered by the Board of Psychology when it defaulted him. The record upon which the trial

court and Court of Appeal rely is a collection of investigative reports which Dr. Jensen did not see until he received these documents in preparation for his mandate proceeding in superior court. He never had a hearing at which he could challenge or dispute the contents of these raw investigative files.

It is from these raw investigative files that the Court of Appeal concluded that "Dr. Jensen was aware that his patients had filed complaints against him, the Board had initiated an active disciplinary investigation, and disciplinary charges could be or probably would be filed against him." (App. 22.) Unfortunately, even if known to Dr. Jensen, the foregoing facts would have required considerable prescience (if not clairvoyance) on the part of Dr. Jensen to know that the certified mail envelope which was returned "Unclaimed," contained an accusation. Even more clairvoyance was required of Dr. Jensen to know what charges the accusation contained and when they had to be answered. Yet the California courts have taken the position that Dr. Jensen received notice of all of this information from the mere fact that several attempts were made to deliver a certified mail package from an unknown sender and with no indication of the contents.

The "FACTS" section of the Court of Appeal opinion is merely a recitation of the unproved allegations of the administrative accusation. The Court of Appeal found that, by failing to return a notice of defense, Dr. Jensen was deemed to have admitted the recitals in the accusation. (App. 27.) These "FACTS" have never been proved.

Lastly, in *Evans v. Department of Motor Vehicles*, 21 Cal.App.4th 958, 26 Cal.Rptr.2d 460, *cert. denied*, ___ U.S. ___, 130 L.E.2d 43, 115 S.Ct. 92 (1994), this Court denied certiorari in a different context. In *Evans*, the certified letter containing the accusation was actually delivered to the address of record of an auto dismantler. The person who received the accusation containing the notice of charges did not give the envelope and its contents to the accused. Also unlike the present case, Evans learned that he had been defaulted before the Board lost jurisdiction to reconsider its default decision and did receive a hearing on an application for relief from default. In this case, the Court of Appeal opinion states that " . . . Here, Dr. Jensen applied for relief from the default decision outside of the 30 day time period in which the Board has discretion to grant relief. . . . " (App. 24.) That conclusion has no record support. Dr. Jensen did not learn of the default decision until after the Board of Psychology already lacked jurisdiction to reconsider his case. He did not make any application to the Board because the Board had lost jurisdiction to act before he learned of the default decision revoking his license.

When the brief in opposition to this petition purports to review to factual findings, petitioner Jensen urges this Court to keep in mind that, since he was defaulted, those purported findings are not based on evidence presented at any hearing at which he had notice and an opportunity to be heard (including the right to call and cross-examine witnesses).

No exceptional factual review will be necessary if this Court concludes as a matter of law that certified mail

must actually be delivered to satisfy the due process criteria of *Mullane v. Central Hanover Bank.*

## CONCLUSION

For the foregoing reasons, petitioner Jensen urges this Court to grant this petition for a writ of certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Five.

Dated: November 12, 1996.

Respectfully submitted,

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## APPENDIX A

## OPINION OF CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT DIVISION FIVE

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

| | |
|---|---|
| J. ALAN JENSEN,<br>Plaintiff and Appellant,<br>v.<br>BOARD OF PSYCHOLOGY OF THE STATE OF CALIFORNIA,<br>Defendant and Respondent. | B091019<br>(Super. Ct. No. BS026961)<br>(Filed May 14, 1996) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Diane Wayne, Judge. Affirmed.

Russell Iungerich for Plaintiff and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Nancy Ann Stoner, Supervising Deputy Attorney General, and Robert McKim Bell, Deputy Attorney General, for Plaintiff and Respondent.

J. Alan Jensen, Ph.D, appeals from a judgment in favor of the Board of Psychology denying Dr. Jensen's petition for a writ of administrative mandate. The Board issued a default decision revoking Dr. Jensen's license to practice psychology. Dr. Jensen contends: (1) the accusation against him was not served in the manner required by statute; (2) his due process rights under the Fourteenth Amendment to the United States Constitution were violated, because he never received actual notice of the accusation or an opportunity to be heard; and (3) a default decision should not have been entered against him without an evidentiary hearing. The trial court denied Dr. Jensen's petition for a writ of administrative mandate on the grounds that the Board satisfied both statutory and due process notice requirements and was not required to hold an evidentiary hearing. We affirm.

## PROCEDURAL BACKGROUND

On July 15, 1993, the Board's executive officer issued an administrative accusation against Dr. Jensen, alleging he was subject to disciplinary action for numerous violations of the Business and Professions Code, including willful, unauthorized communication of confidential patient information to third parties (Bus. & Prof. Code, § 2960, subd. (h)), gross negligence in the practice of psychology (Bus. & Prof. Code, § 2960, subd. (j)), dishonest, corrupt or fraudulent acts substantially related to his qualifications, or duties as a psychologist (Bus. & Prof. Code § 2960, subd. (n)), and functioning outside his field of competence (Bus. & Prof. Code, § 2960 (p)). The accusation requested Dr. Jensen's state-issued psychologist's license be suspended or revoked.

The accusation was served by certified mail to the Malibu address Dr. Jensen had filed with the Board, as his home and office address.

The United States Postal Service made three attempts to deliver the certified mail, on July 17, August 6, and August 16, 1993. The package was returned to the Board on August 16 marked "unclaimed." According to the Malibu Postmaster; Dr. Jensen routinely refused to accept registered or certified mail.

Dr. Jensen did not file a notice of defense. The Board verified Dr. Jensen's address and requested the Attorney General's Office to prepare a proposed default decision. The proposed default decision, incorporating the accusation, was circulated to the Board members for a mail vote. The Board found the accusation against Dr. Jensen to be true and voted to adopt the proposed default decision. The Board issued the default decision revoking Dr. Jensen's license to practice as a psychologist on November 22, 1993, effective December 22, 1993, and served it on Dr. Jensen by certified mail to the same Malibu address.[1]

On November 24, December 17, and December 27, 1993, the United States Postal Service made three attempts to deliver the default decision. On December 27, 1993, the package was returned to the Board marked "unclaimed."

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[1] Dr. Jensen requests that this court take judicial notice of the fact that on November 9, 1993, Dr. Jensen was taken into custody as a result of a neighbor's complaint against him. As a condition of bail, Dr. Jensen was ordered to stay away from his home until March 8, 1994. His request for judicial notice is hereby granted.

Board investigator Sandra McKenzie made two unsuccessful attempts to personally deliver the default decision to Dr. Jensen at the Malibu address on December 2 and December 10, 1993. Dr. Jensen's address is located off a dirt road in a remote area of Malibu Canyon and serves as both Dr. Jensen's home and office. McKenzie contacted Los Angeles County Deputy Sheriff May to obtain directions. Deputy May advised McKenzie that there had been numerous sheriff responses to Dr. Jensen's residence of verbal and physical altercations. He further stated that Dr. Jensen was a volatile, unstable individual who posed a threat to anyone who confronted him. If she intended to enter the property, law enforcement back-up would be necessary. The residence was surrounded by a locked six-foot chain link fence, guarded by a large barking dog, and occupied. The entry gate posted the street number and the word "Jensen" was painted on a stone. On her first visit, McKenzie attempted to draw attention to her presence at the gate without success. On her second visit, McKenzie encountered a woman locking the fence. However, when McKenzie approached the woman with her identification badge displayed, the woman got into her car and attempted to run McKenzie down.

McKenzie went to Dr. Jensen's neighbor's house and interviewed him. Dr. Jensen's neighbor, John St. Clair, advised her that numerous suits were pending against Dr. Jensen, including his own complaint for misdemeanor assault. He confirmed Deputy May's comments to the effect that Dr. Jensen was a violent and unstable person with a propensity for physical outbursts. McKenzie discontinued her attempts to personally deliver the default decision.

Dr. Jensen stated that approximately two weeks after the effective date of the decision, a reporter informed him that his license had been revoked. Dr. Jensen telephoned the Board and the Attorney General's Office, asking for a hearing. However, the Board's power to reconsider its decision expires on the effective date of the decision or 30 days after mailing the decision to the respondent, whichever is earlier. In this case, the Board's power to reconsider the decision lapsed on the effective date of the decision, December 22, 1993.

On January 21, 1994, Dr. Jensen filed a petition for writ of administrative mandate under Code of Civil Procedure section 1094.5 and requested a stay. The Board filed its answer on March 10, 1994.

On April 5, 1994, Dr. Jensen filed with the trial court the administrative record supplied by the Attorney General's Office with objections to the record on the grounds that the declarations, reports and other evidence against Dr. Jensen should not be considered part of the administrative proceedings because the Board did not consider them in reaching its default decision. This objection was impliedly denied by the trial court.

Both Dr. Jensen and the Board filed memoranda of points and authorities. Dr. Jensen filed a reply and requested a statement of decision.

Hearings were held on June 14, 1994, and July 18, 1994. The minute order for July 18, 1994, denied the petition for writ of mandate, ordered the Board to prepare a judgment, and directed counsel to rebrief the "default prove-up" issue. A nunc pro tunc minute order

issued July 27, 1994, vacated the July 18, 1994 minute order, and ordered the Board to prepare a judgment only.

Dr. Jensen objected to the Board's proposed judgment and again requested a statement of decision. The trial court signed the proposed judgment submitted by the Board denying the petition for writ of mandate on all grounds.

The trial court made the following findings:

"1. *Service Was Not Defective*

"The procedures employed by the Board of Psychology are mandated by the Administrative Procedure Act. Bus. & Prof. Code § 2965 et seq. Service requirements are determined by Government Code section 11505[, subdivision] (c). That section provides in pertinent part that:

" ' . . . Service by registered mail shall be effective if a statute or agency rule requires respondent to file his address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to the respondent at the latest address on file with the agency.'

"Additionally, Government Code section 8311 provides:

" 'Whenever any notice or other communication is required by any law to be mailed by registered mail to or by the state, or any officer or any agency thereof, the mailing of such notice or other communication by certified mail shall be deemed to be a sufficient compliance with the requirements of such law.'

"Respondents complied with the notice statutes by three attempts to deliver at the business/residence address of Petitioner, all of which were not accepted. AR 37-40. Three attempts on July 17, August 6 and August 16, 1993 were made to deliver the Default Decision. Thus, notice of the default and default decision was also adequately 'served' though not accepted. AR 70-77. Every indication is that Petitioner intentionally refused this notice. According to the declaration of [the local postmaster] it is not unusual for Petitioner to fail to accept such mail. See also, AR 319-323.

"As indicated in *Evans v. DMV* (1994) 21 Cal.App.4 958:

" '. . . . [T]he statutory scheme for serving notice of a disciplinary proceeding by certified mail at the dismantler's established place of business satisfied due process because it is reasonably calculated to provide the dismantler with the notice of the proceedings . . . actual notice is not a necessary element of proper service in a disciplinary proceeding.' *Id.* at 968.

"2. *Actual Notice Not Required*

"As indicated in *Evans*, the rule that actual notice is not required can be overcome upon an adequate showing that actual notice was not received and there was no avoidance of service. No such showing has been made in this case. Instead, the Petitioner acted promptly when he became aware of the nature of the Board's decision. To allow Petitioner to require a new hearing would be inherently unfair, having directly avoided notice.

"It has long been the law that due process does not require actual notice as long as the method used is 'reasonably certain to accomplish that end.' *Mullane v. Central Hanover Tr. Co.* 339 U.S. 306, 319. When, as here, the Petitioner is required to keep Respondent apprised of his address, notice to that address, by certified mail, is adequate. *Middleton v. State Bar* 51 Cal.3d 548. There was no statutory or constitutional violation of due process.

"3. *Default Hearing*

"The Administrative Procedure Act specifically determined that upon a default by Petitioner his right to a hearing terminates. Government Code section 11506[, subdivision] (b) provides:

" 'The respondent shall be entitled to a hearing on the merits if he files a notice of defense, and any such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such notice shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing . . . '

" 'The defendant's failure to answer has the same effect as an express admission of the matters well pleaded in the complaint. The judgment is, in consequence, res judicata on the issue of the right to the relief awarded.' 6 Witkin, Cal. Proc. (3d Ed. 1985) Proceedings Without Trial p. 545. Clearly, the intent of the statute is to forfeit a respondent's right to a hearing when he or she refuses to file a notice of defense. The action constitutes an admission as

to the truth of the pleading and obviates a hearing."

Dr. Jensen filed a timely notice of appeal.

## FACTS

The Board issued Dr. Jensen a license to practice psychology on October 26, 1988. Numerous patients lodged complaints against Dr. Jensen. Two representative complaints were selected by the Board to illustrate the allegations against Dr. Jensen, those of K.K. and J.R.

K.K., a professional tennis player, read an advertisement describing Dr. Jensen's practice in "sports medicine," physical therapy and psychotherapy. Hoping to improve her confidence in her game and her ability to cope with sports injuries, K.K. called to inquire about Dr. Jensen's services. He quoted his customary fee as $150 an hour and invited her to come to his home/office in Malibu for additional literature. K.K. drove out and Dr. Jensen's secretary handed her an envelope through a locked fence. K.K. had no personal contact with Dr. Jensen that day.

At K.K.'s first appointment on February 11, 1989, she indicated that she could not afford many hours of treatment. Dr. Jensen and K.K. agreed that she would pay $1,000 and, after that, Dr. Jensen would accept whatever K.K.'s insurance covered as payment in full. During the first week, K.K. took a battery of 23 psychological tests. Often during testing, Dr. Jensen was not present or was involved in other activities such as talking to other patients.

From February 13 through March 24, 1989, K.K.'s therapy consisted of workouts at the Pepperdine University swimming pool, physical therapy, hypnosis, videos, and incessant telephone consultations. K.K. soon became suspicious of Dr. Jensen's obsessive behavior. Dr. Jensen insisted on seeing her for 3 to 4 hours a day and request she "check-in" with him in the evenings by telephone. K.K. became concerned about her tennis training time and her financial responsibilities.

K.K. skipped treatment on February 16 and 18. When Dr. Jensen could not reach her by telephone, he called K.K.'s boyfriend J.R. to enlist his support, telling him that if K.K. discontinued treatment, she would never succeed in tennis and would destroy their relationship. J.R. explained that K.K. was having second thoughts about continuing treatment because she feared hidden costs and the negative and controlling methods Dr. Jensen used. Dr. Jensen replied that she was a "destructive human being" and her financial fears were "sabotage" because they had agreed K.K. would only pay $1,000. Dr. Jensen convinced J.R. that it was in K.K.'s best interest to continue treatment.

K.K. returned to treatment. A former back and leg injury recurred. Dr. Jensen told her that she was subconsciously sabotaging herself. During physical therapy sessions in the pool, Dr. Jensen would reprimand K.K. for showing any signs of pain. While K.K. exercised in the pool, Dr. Jensen also worked out and guided several other patients in their exercises.

During one session, K.K. stated that J.R. was experiencing serious back pain because of a work-related injury,

and Dr. Jensen suggested he come to the next pool session. J.R. explained to Dr. Jensen that he could not personally afford the cost of treatment. Dr. Jensen told him to get a doctor's note prescribing water therapy, and Dr. Jensen would accept whatever worker's compensation provided.

Between March 2 to March 10, 1989, K.K. competed in a tennis tournament in Palm Springs. If K.K. failed to call him, Dr. Jensen reprimanded her or called J.R. to find out why she had not called him. On March 17, 1989, Dr. Jensen expressed that J.R. might be contributing to K.K.'s career problems and asked J.R. to come in and talk with him. On March 20, 1989, J.R. began therapy by taking hours of psychological tests similar to the ones taken by K.K. The tests seemed to have no relationship to J.R.'s back or K.K.'s tennis. Finally, J.R. stopped in the middle of one test and found Dr. Jensen outside watering his yard. Dr. Jensen told J.R. the tests showed J.R. and K.K.'s incompatibility. J.R. replied that the couple had their own therapist for relationship issues and refused to take any more tests.

Dr. Jensen requested payment from J.R. for water equipment that Dr. Jensen had ordered for him. J.R. replied that he had not asked for water equipment and in addition, their agreement was that worker's compensation would be billed for all charges. Later, K.K. told J.R. that Dr. Jensen had requested she pay for J.R.'s water equipment.

On March 24, 1989, K.K. had an appointment for her leg injury with her chiropractor, Dr. Frank Bredice. She told Dr. Bredice that she had an appointment with Dr.

Jensen to do pool work afterward. Dr. Bredice urged her to return home and rest her leg since she was experiencing severe pain and the two hour drive to Malibu in a manual-shift car, combined with the pool work, would only aggravate the leg injury. K.K. phoned Dr. Jensen from outside Dr. Bredice's office building to cancel her appointment. Dr. Jensen was belittling, belligerent, condescending and overbearing. He played on K.K.'s feelings of inadequacy by saying, "I know that's what you said you want, I heard you. Now, let me speak to the adult in you, not to the child. You are sabotaging yourself. How do you expect to succeed in your tennis career? Now get in your car right now! I'll see you here in a couple of hours." K.K. hung up the phone in tears and drove home.

Dr. Jensen phoned K.K. at home later that same evening. J.R. spoke with him and explained that K.K. could barely drive her car or walk up stairs. Dr. Jensen told J.R., "Don't you see how destructive your behavior is, you're enabling her!" J.R. stated that K.K. had a legitimate injury and hung up. Dr. Jensen telephoned Dr. Bredice and told him that K.K.'s injuries were "psycho-somatic" and that she was attempting to avoid his therapy. Dr. Jensen also said that K.K. and J.R. were unstable, manipulative people who needed extensive therapy. He was the only one who could save K.K.'s tennis career and her life.

On March 25, 1989, K.K. received an insurance statement indicating that Dr. Jensen had billed her insurance company $7,350 for the first 19 days of therapy. The insurance statement contained unethical charges such as $150 for the first day when K.K. merely picked up literature from Dr. Jensen's secretary, amounts for several

hours of physiotherapy and nutrition instruction, hours exercising at the pool charged at Dr. Jensen's full rate of $150 per hour, even on days when other patients were exercising and Dr. Jensen was himself exercising, and amounts for the hours K.K. had spent taking tests while Dr. Jensen conducted other activities. Dr. Jensen assured K.K. it was standard to overcharge insurance companies because they never cover all expenses. When K.K. asked who would be responsible for the additional $6,285, Dr. Jensen replied, "You would. How do you expect to win money without spending money? In no time you'll be making hundreds of thousands of dollars and this will seem like nothing." K.K. and J.R. terminated their therapy.

Dr. Jensen attempted verbal manipulations to regain control over K.K. and J.R., using comments such as, "If you don't complete therapy K.K., you'll be a loser the rest of your life. You will lose in all the tournaments you play. You'll never get your career back if you don't finish your therapy with me, and J.R. you obviously want to live with pain. . . . Don't you two see how you enable each other and how destructive your relationship is? Neither one of you will ever be successful and you'll be unhappy the rest of your lives." J.R. requested that Dr. Jensen cease contacting him or K.K. except by mail. Despite J.R.'s request, Dr. Jensen made numerous phone calls the following week, employing the same manipulative emotional threats and pleading for J.R. and K.K. to come back and "finish" therapy. J.R. finally told Dr. Jensen that any further contact should be through their attorney, Marcus Wasson, III.

On March 31, 1989, K.K. and J.R. received a bill from Dr. Jensen charging them for water equipment. On Sunday morning, two days later, K.K. was awakened by a knock at the front door. Dr. Jensen had brought the police and demanded his water equipment or a check. J.R. told the officers that their attorney was handling the matter and Dr. Jensen was not to communicate with them directly. J.R. showed the officers the bill they had just received from Dr. Jensen two days earlier and stated that they felt Dr. Jensen was dangerous. The officers escorted Dr. Jensen off the premises. K.K. and J.R. filed complaints with the Board, as well as a civil action.

The Board assigned investigator Lester Williams to look into the various complaints against Dr. Jensen, including those of K.K. and J.R. Williams contacted Dr. Jensen about the complaints against him, as well as other signed statements Williams had taken. In a letter to Williams dated July 10, 1990, Dr. Jensen indicated that he felt K.K., J.R. and the other complainants were attempting to avoid payment for services. He said K.K. had told him she would need extra time after her insurance paid to complete payment of her balance. He also said J.R. and K.K. had agreed to pay for their own water equipment.

On July 16, 1990, Williams visited Dr. Jensen at his home/office and informed him that the Board had initiated an active disciplinary investigation. Dr. Jensen provided Williams with the patients' medical records and a summary of his treatment for each in letter form. Dr. Jensen requested that Williams call him if an accusation was issued. In September, Williams called Dr. Jensen and requested all raw test materials that had not been provided. Dr. Jensen repeatedly stalled this request. In letters

to K.K. and J.R., Dr. Jensen indicated they would have to pay excessive copying costs before he would release their records. He also urged them to drop all charges against his office.

Williams commissioned three independent psychologists to review the complaints against Dr. Jensen and evaluate whether Dr. Jensen had violated sections of the Business and Professions Code. The resulting reports indicated that Dr. Jensen had violated several code provisions: he was practicing physical therapy without a license; made false and misleading claims in his advertising; committed gross negligence in multiple instances; breached his duty to turn over patients' records promptly at their request; willfully breached patients' confidentiality; committed insurance fraud; and billed patients inappropriately.

Pursuant to Board procedures, the Board's executive officer examined the evidence against Dr. Jensen. He then prepared and issued the administrative accusation alleging that Dr. Jensen was subject to disciplinary action because he had violated numerous sections of the Business and Professions Code in the treatment of his patients. The accusation contained the executive officer's summary of the evidence compiled from patient complaints, Dr. Jensen's promotional material, and reports from the psychologists who had reviewed the evidence against Dr. Jensen and had suggested various code violations.

The administrative accusation specifically alleged four causes of action against Dr. Jensen. First, it alleged that under Business and Professions Code section 2960,

subdivision (h), Dr. Jensen willfully communicated confidential patient information to third parties without authorization. Dr. Jensen was required to obtain his patient's written consent before communicating such information, which he did not. In addition, when Dr. Jensen could not contact K.K., he talked to J.R., telling him his analysis of K.K.'s mental state. Dr. Jensen also told K.K.'s chiropractor that K.K.'s injuries were "psychosomatic" and other evaluations of K.K. from his sessions.

The second cause of action against Dr. Jensen under Business and Professions Code section 2960, subdivision (j), was gross negligence in the practice of psychology. Dr. Jensen's administration, handling and reporting of psychological tests was unprofessional and inappropriate. During tests he answered phone calls, talked with other patients, and watered his lawn. Such behavior is distracting for the test subject and potentially invalidates the tests. In addition, Dr. Jensen's appointment schedule with K.K. requiring three to four hours a day and additional telephone conferences was far more than the schedule recommended for even the most intensive psychotherapy. Dr. Jensen acted in ways that were inappropriate and intimidating as well. He became hostile and loud with patients who discontinued treatment or missed appointments. He used reprimands, which were not normally a part of psychotherapy, and made catastrophic predictions about what would happen without continued therapy. Once a patient has firmly left a therapy situation, a therapist should not continue trying to get the patient to resume treatment. Dr. Jensen's numerous phone calls after termination, especially coupled with the negative predictions of the future, constituted gross negligence.

Bringing police to a patient's apartment to demand payment is an extreme departure from the standard of practice. Finally, Dr. Jensen's refusal to respond promptly to patients' requests that copies of their records be sent to another therapist without advance payment of "special handling charges" is gross negligence.

The third cause of action was pled under Business and Professions Code, section 2960, subdivision (n), alleging Dr. Jensen had committed dishonest, corrupt or fraudulent acts substantially related to his qualifications, functions or duties as a psychologist. Dr. Jensen first formed an agreement with K.K. that she would be responsible for $1000 and her insurance company would provide whatever was collectible after that. The next day K.K. signed a form regarding fees which indicated that Dr. Jensen would charge $150 per hour plus costs for testing and equipment. K.K.'s insurance company's statement indicated that Dr. Jensen had billed them $7,350 for 19 days of treatment, of which they would cover only $1000. Dr. Jensen told K.K. she was responsible for the remainder. To assure K.K. that her liability was limited to $1000 and then later ask her to sign a form which placed a higher responsibility on her was dishonest, corrupt and fraudulent conduct. Moreover, it was dishonest, corrupt and fraudulent for Dr. Jensen to charge K.K. $150 for "complex medical history and psychological-health testing" on February 9, 1989, when K.K. only had phone contact with Dr. Jensen and picked up literature about his practice from his secretary. Finally, it was dishonest, corrupt and fraudulent conduct to inform K.K. that he could

perform physiotherapy and provide her with physiotherapy advice when he was not licensed to engage in the practice of physical therapy.

The fourth and final cause of action alleged under Business and Professions Code section 2960, subdivision (p), was that Dr. Jensen had functioned outside his field of competence. Specifically, in practicing "sports medicine" and physiotherapy, Dr. Jensen functioned beyond the field of psychology. It is not within the psychologist's realm of expertise and competence to determine whether patients need medicine or in what dosage. Dr. Jensen unlawfully practiced physical therapy as demonstrated by his charges to the insurance company for physiotherapy on February 16, 17, 20 and 21 and the many other occasions he performed physiotherapy with K.K. In addition, Dr. Jensen asked K.K. to perform physical activities which she had been advised not to do by her chiropractor.

## DISCUSSION

### *Standard of Review*

When an administrative decision substantially affects a fundamental vested right, such as the revocation of a professional license, the independent judgment standard of review applies. (*Berlinghieri v. DMV* (1983) 33 Cal.3d 932, 395-396.) The trial court must examine the administrative record for errors of law and exercise its independent judgment upon the evidence. (Civ. Proc. section 1094.5(c).) The appellate court must sustain the trial court's factual findings if substantial evidence supports

them. (*Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314.)

The appellate court determines whether the judgment is supported by substantial evidence by looking only at the evidence supporting the prevailing party, taking into account all inferences which might reasonably have been thought by the trial court to lead to the same conclusion, and disregarding evidence to the contrary. (*Roberts v. Salot* (1958) 166 Cal.App.2d 294, 296; *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 872.) The appellate court does not weigh the evidence. (*Id.*) Every substantial conflict in the testimony is to be resolved in favor of the judgment. (*Bancroft-Whitney Co. v. McHugh* (1913) 166 Cal. 140, 142.) Thus, the judgment of the trial court is presumed to be correct. All presumptions not contradicted by the record on appeal are indulged to support the judgment, and the appellant has the burden to affirmatively show, based on the record, the trial court's commission of reversible error. (See, e.g., *Walling v. Kimball* (194) [sic] 17 Cal.2d 364, 373; *Ellis v. Roshei Corp.* (1983) 143 Cal.App.3d 642, 645, fn. 2.) "If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed." (*Estate of Teel* (1944) 25 Cal.2d 520, 527.)

***Statutory Service Requirements***

Dr. Jensen asserts service was not completed under the governing code sections, because the certified letters containing the accusation and default decision were returned to the Board unclaimed.

The Board of Psychology's disciplinary proceedings are governed by the Administrative Procedure Act ("APA"). (Gov. Code, § 11500 et seq.) The Board must satisfy the service requirements contained in Government Code section 11505, subdivision (c) of the APA. Section 11505, subdivision (c) provides as follows:

> "The accusation and all accompanying information may be sent to respondent by any means selected by the agency. But no order adversely affecting the right of the respondent shall be made by the agency in any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. Service by registered mail shall be effective if a statute of agency rule requires respondent to file his address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to respondent at the latest address on file with the agency."

Title 16, California Code of Regulations, section 1380.5 requires that "Each person holding a license as a psychologist shall file with the board his proper and current mailing address, and shall report immediately to the board at its Sacramento office any and all changes of address, giving both his old and new address." Since Dr. Jensen was required to file his current mailing address with the Board, the last sentence of Government Code section 11505, subsection (c) dictates the method for serving Dr. Jensen with an order that will potentially affect him adversely. According to this provision, the Board

may send a registered letter to the latest address on file. Where the state, or any officer or agency of the state, is required by law to send a notice by registered mail, sending the notice by certified mail is considered sufficient compliance. (Gov. Code, § 8311.) Most importantly, the provision states that mailing the accusation to the address of record is sufficient. Unlike other statutes which allow service by mail, but require additional proof of service such as a return receipt signed by the accused party, section 11505, subsection (c) requires only that the Board mail the accusation and does not mention any other requirements to complete service. (*Evans v. DMV* (1994) 21 Cal.App.4th 958, 970.)

The Board complied with the statutory procedures required to notify Dr. Jensen of the accusation against him. Because Dr. Jensen was required to keep a current address on file with the Board, simply mailing an accusation to Dr. Jensen's latest address by registered or certified letter provided Dr. Jensen with sufficient notice under the statute. The purpose of providing the Board with a current address is precisely so that the Board can contact him as necessary. Three attempts to deliver the accusation at Dr. Jensen's business/residence address were returned unclaimed. Similarly, three attempts to deliver the default decision were returned unclaimed. Since no return receipt or proof of acceptance was required, statutory service requirements were satisfied when the Board placed the documents in the mail.

There is no evidence Dr. Jensen was not residing or practicing at his address of record from July through October of 1993. If Dr. Jensen was not residing or practicing at the Malibu address, it was his duty to inform the

Board immediately of an address where he could be contacted and served. Dr. Jensen was aware that his patients had filed complaints against him, the Board had initiated an active disciplinary investigation, and disciplinary charges could be and probably would be filed against him. Substantial evidence exists to support the trial court's finding that the Board complied with the statutory requirements for serving Dr. Jensen with notice and Dr. Jensen intentionally avoided the Board's attempts at notice.

*Due Process*

Dr. Jensen argues that even if the statutory requirements for service were met, the constitutional requirements for due process were not satisfied by the statute because he never had actual notice of the proceedings and an opportunity to be heard.

Due process requires notice reasonably calculated under the circumstances to apprise interested parties of the pending action and give them an opportunity to present their objections. (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314-315.) "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." (*Ibid.*) Due process does not require actual notice, as long as the method used is "reasonably certain" to accomplish actual notice. (*Id.* at 319.) When a licensing body requires all licensees to maintain a current address on file, the statutory scheme for serving notice of a disciplinary proceeding by certified mail at the licensee's established place of business satisfies due process

because it is reasonably calculated to provide the licensee with notice of the proceeding. (*Evans v. DMV, supra,* 21 Cal.App.4th at p. 971.)

Moreover, the APA provides agencies with discretion to grant relief from default based upon a showing that the party had not received actual notice of the accusation and hearing.[2] *Evans v. DMV, supra,* 21 Cal.App.4th at p. 972.) Government Code section 11506, subdivision (b) states: "The respondent shall be entitled to a hearing on the merits if he files a notice of defense, and any such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such notice shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing. . . . " Government Code section 11521 further adds that "(a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or

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[2] The provisions for relief from default in an administrative proceeding are different than those in a civil proceeding. In civil proceedings, a party may seek relief from default on the grounds of mistake, inadvertence, surprise, or excusable neglect within six months after the default was taken. (Civ. Proc. Code, § 473.) In addition, if a default or default judgment is entered against a party in civil proceedings and service of summons did not provide the party actual notice in time to defend the action, the party has up to two years to file a notice of motion to set aside the default and ask for leave to defend the action. (Civ. Proc. Code, § 473.5.) The notice must be accompanied by an affidavit showing under oath that the party's lack of actual notice was not caused by his or her avoidance of service or inexcusable neglect. (*Ibid.*)

mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period. . . . [¶] (b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to an administrative law judge."

The APA does not describe what facts a respondent must show to receive relief from default. In *Evans*, the DMV had the discretion to relieve respondent from the default decision because he had contacted them within the 30-day time limit for exercising discretion. The *Evans* court suggested criteria for evaluating a request for relief from default through analogy to the requirements in civil proceedings: (1) an affidavit showing under oath that the party's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect; and (2) where service is made by mail in compliance with the manner set forth in a statute, it is the addressee's burden to prove he or she did not receive notice. (*Evans v. DMV, supra*, 21 Cal.App.4th at p. 973, see Civ. Proc. Code, § 473.5) Here, Dr. Jensen applied for relief from the default decision outside of the 30 day time period in which the Board has discretion to grant relief.

The Board's service on Dr. Jensen by certified mail at his last provided address in compliance with Government Code sections 11505, subdivision (c), and 8311 satisfied due process because it was reasonably calculated to provide Dr. Jensen with actual notice of the proceedings against him. Dr. Jensen is presumed to be aware of the

statutes and regulations governing his business. Therefore, he knows that he must keep the Board apprised of his address because the Board may send important notices and communications to this address. Dr. Jensen is in the best position to ensure the receipt of any notices by providing the Board with the most complete address available. (Cf. *Evans v. DMV, supra,* 21 Cal.App.4th at pp. 970-972.) Moreover, Dr. Jensen's awareness of a pending investigation and refusal to pick up registered or certified mail constitute substantial evidence supporting the trial court's finding that Dr. Jensen avoided service.

The Board did not have the power to grant relief from the default decision because more than 30 days had passed since the decision had become final. Even if the Board or the trial court had discretion to grant relief, Dr. Jensen did not provide sufficient evidence to prove that he did not intentionally avoid service or that his failure to provide the Board with another address was excusable neglect. Therefore, the certified letter mailed to the address provided by Dr. Jensen and the additional attempts to personally serve Dr. Jensen were reasonably calculated to provide actual notice to Dr. Jensen, apprise him of the pending proceedings against his license and afford him an opportunity to be heard.[3] Dr. Jensen did not take advantage of any opportunity to seek relief from his default.

Substantial evidence supports the trial court's finding that the Board's notice was reasonably calculated to

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[3] Dr. Jensen cites several cases interpreting statutes which require more than mailing to complete service. These cases are inapposite.

provide Dr. Jensen with notice, but Dr. Jensen avoided notice. There was no statutory or constitutional violation of due process.

*Default Hearing*

Dr. Jensen argues that the Board was required to hold an evidentiary hearing supporting the charges against him before rendering the default decision to revoke his license to practice psychology.

A respondent must file a notice of defense within 15 days after service of the accusation in order to preserve his or her right to a hearing on the merits. (Gov. Code section 11506, subd. (a)(1).) Where the respondent waives this right by failing to file a notice of defense and failing to appear, Government Code section 11520, subdivision (a) provides that "the agency may take action based upon the respondent's express admissions or upon other evidence[,] and affidavits may be used as evidence without any notice to respondent." This flexible standard for taking action does not require the evidentiary hearings which are required in civil default "prove-ups." (Cf. Code of Civ. Proc., §§ 471.5, 585-586.) Under Code of Civil Procedure section 585, subdivision (b), "if the defendant has been served . . . and no answer . . . has been filed- . . . within the time specified . . . , the clerk, . . . upon written application of the plaintiff, shall enter the default of the defendant. The plaintiff thereafter may apply to the court for the relief demanded in the complaint; the court shall hear the evidence offered by the plaintiff, and shall render judgment in his or her favor for such sum (not

exceeding the amount stated in the complaint . . . ), as appears by such evidence to be just."

Where a statute referring to a certain subject contains a particular provision, the omission of such a provision from a similar statute concerning a related subject is significant to show that a different intention existed. (*City of Port Hueneme v. City of Oxnard* (1959) 52 Cal.2d 385, 395.) Moreover, "the defendant's failure to answer has the same effect as an express admission of the matters well pleaded in the complaint. The judgment is, in consequence, res judicata on the issue of the right to the relief awarded." (6 Witkin, Cal. Proc. (3d ed. 1985) Proceedings Without Trial, § 243, p. 545, italics omitted.)

The accusation against Dr. Jensen contained an extensive summary of the facts and several well-pled causes of action. When Dr. Jensen failed to return a notice of defense or appear in front of the Board, he waived his right to a hearing and was deemed to have admitted the recitals in the accusation. Government Code section 11520, subdivision (a) does not require the agency to hold a hearing. The Board was entitled to take action based on Dr. Jensen's admissions, which were contained in the accusation attached to the default decision. Moreover, the Legislature has demonstrated in the provisions governing civil proceedings that it knows how to require the plaintiff to prove a default in a hearing without the defendant. No such provision is contained in the APA and we interpret this omission to mean that the Legislature did not intend to require the Board to hold default hearings. It was proper for the Board to review and vote on the default decision circulated by the Board's executive officer.

The APA does not provide specific procedures for entering a default decision. Many agencies enter a default as the Board does, by having an employee of the agency assemble the evidence in documentary form, draft a decision, and serve it on the respondent. Other agencies have a hearing officer of the Office of Administrative Hearings hear the default after a notice of default hearing has been served on the respondent. Either course is appropriate. (Cal. Admin. Hearing Prac. (Cont.Ed.Bar 1984) § 240, p. 80.)

The Board followed accepted procedures by circulating Dr. Jensen's admissions to the members of the decision-making committee. To prepare the accusation, the Board's executive officer assembled evidence including patients' complaints and various psychologists' reports of the violations contained in the patient complaints. Dr. Jensen waived his right to challenge the charges against him or introduce additional evidence on his own behalf by not responding to the mailed notices. The Board considered the accusation and revoked Dr. Jensen's license.[4] Substantial evidence supports the trial court's finding that the default was properly taken according to accepted procedures.

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[4] Since the trial court was required to review the record de novo, and all of the evidence contained in the administrative record was clearly before the trial court, any defect in the default is cured.

## DISPOSITION

The judgment is affirmed. Dr. Jensen is to pay the Board's costs on appeal.

NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

TURNER, P.J.

GODOY PEREZ, J.

## APPENDIX B

## CALIFORNIA SUPREME COURT

## ORDER DENYING PETITION FOR REVIEW

Second Appellate District, Division Five, No. B091019
S054474

IN THE SUPREME COURT OF CALIFORNIA

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J. ALAN JENSEN, Appellant

v.

BOARD OF PSYCHOLOGY OF THE STATE OF CALIFORNIA, Respondent

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Appellant's petition for review DENIED.

The request for an order directing publication of the opinion is denied.

(Filed Aug. 14, 1996)

/s/ R. GEORGE
Chief Justice

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